



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM. D.S MAJANJA J.

CIVIL CASE NO. 185 OF 2017

BETWEEN

GROFIN AFRICA FUNDPLAINTIFF

AND

UNIFORM SHOP EAST AFRICA LIMITED.....1ST DEFENDANT

KENNETH NYAGA MWINDI2ND DEFENDANT

PHILIP COLLINS NGILA.....3RD DEFENDANT

FREDRICK MURUNGA4TH DEFENDANT

SPORTS SHOP EAST AFRICA LIMITED5TH DEFENDANT

GOLF SHOP EAST AFRICA LIMITED6TH DEFENDANT

J U D G M E N T

1. The plaintiff's case as set out in the plaint dated 26th April 2017 is for judgment for Kshs. 30,279,298.00 together with interest thereon and costs against the defendants.
2. The basis of the claim is that the plaintiff, a finance and lending company, advanced to the 1st defendant Kshs. 14,487,200.00 under a facility agreement dated 7th February 2012 ("the Agreement"). Under that facility Kshs. 14,000,000.00 was for the purchase of inventory and the remaining Kshs. 487,200.00 was for a draw down for capitalized fees.
3. The loan was secured by a guarantee and indemnity issued by Richard Boro Ndung'u, the 2nd, 3rd, 4th, 5th and 6th defendants. The 1st defendant also provided an all asset debenture dated 23rd February 2012 for Kshs. 20,000,000.00 over its existing and future moveable property in favour of the plaintiff.
4. Unfortunately, the 1st defendant defaulted on payment causing the plaintiff to issue demand notices to the defendants. They failed to pay the outstanding amount consequently the plaintiff filed suit to recover the debt.
5. The defendants filed their defence and counterclaim dated 20th July 2017. The defendants denied the Agreement and but in the alternative contested the interest charged by the plaintiff. They also urged that the plaintiff was regulated under the **Banking Act (Chapter 488 of the Laws of Kenya)**, Central Bank Regulations and common law hence it not only lacked capacity to lend money but to do so outside the provisions of the aforesaid laws.
6. In the defence and counterclaim, the defendants' counterclaimed as against the plaintiff for:
 - a. *Unlawful, illegal and unauthorized money laundering business contrary to Central Bank of Kenya Regulations on interest and penalties.*

b. *Loss of business by the defendants.*

7. The matter was set down for hearing today, 19th November 2019 and despite being served with a hearing notice, neither the defendants nor their advocates appeared in court. I directed the matter to proceed for hearing in their absence.

8. The plaintiff called one witness; Rita Odera (PW 1) who is an Investment Executive. She narrated the relationship between the parties as being founded on the Agreement. She produced the Agreement which included guarantees and indemnities by the other defendants. PW 1 also produced a statement of account and certificates of balance to confirm indebtedness together with demand letters to each of the defendants demanding payment. PW 1 told the court that although payment had been made initially, the defendants failed to service the loan.

9. Since the plaintiffs evidence was uncontroverted, I am satisfied that there was an Agreement between the parties and that the plaintiff advanced money to the 1st defendant. I am also satisfied that the 2nd, 3rd, 4th, 5th, 6th defendants guaranteed advances to the 1st defendant and that after default, the plaintiff sent demand notices to each of the defendants who failed to make any payments. This affirmative evidence when considered alongside the bare denials in the defence, which were not supported by any evidence, leads me to the inevitable conclusion that the defendants are indebted to the plaintiff.

10. The defendants have raised an issue regarding application of the **Banking Act** and consequently the interest and penalties charged on one loan. The **Banking Act** defines an institution to mean, “a bank or financial institution or a mortgage finance company”. The same **Act** defines a financial institution to mean:

a company, other than a bank which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for purposes of this Act.

11. **Section 2** of the **Central Bank of Kenya Act** also makes reference to specified financial institutions which simply means a financial institution or mortgage finance company within the meaning of the **Banking Act** which is specified by the bank for purposes of the **Act**. There is a schedule of such specified financial institutions and that schedule does not include the plaintiff. Finally, the plaintiff does not engage in “Banking business” which under **section 2** of the **Banking Act** means –

(a) *the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;*

(b) *the accepting from members of the public of money on current account and payment on and acceptance of cheques;*

(c) *the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money; and*

(d) *such other business activity as the Central Bank may prescribe;*

12. I now turn now to the issue of interest, the plaintiff did not state what interest it sought in the prayers. The plaintiff however relied on Clause 6 of the Agreement to make its case for award of interest. It states as follows:

6.1- *Interest on each loan is calculated daily at a variable interest rate of 25% per annum.*

6.2- *The borrower shall pay accrued interest on each loan on each payment date.*

6.3- *In the event any sum is due and payable but unpaid by the Obligor under a Finance Document (an “Unpaid Sum”), interest (compounded monthly) shall accrue thereon from the due date up to the date of actual payment (both before and after judgment) at the rate which is 2% higher than the rate referred to in Clause 6.1.*

13. The plaintiff pleaded the provisions in Clause 6 at paragraph 10 of the Plaint. Since it is part of the Agreement, I find that the interest applicable is 25% per annum but under Clause 6.2, the rate becomes variable in two respects. It is compounded monthly and at a rate of 2% higher than 25% p.a. However, it is not clear what the variable means and how it applies to the judgment debt hence I shall award interest at court rates.

14. From the uncontested evidence, I find that the plaintiff has proved its case on the balance of probabilities. The amount certified in the Certificate of Balance dated 10th March 2017 is Kshs. 30,279,298.00 which includes the interest calculated in accordance with the Agreement.

15. **I therefore enter judgment for the plaintiff against the defendants jointly and severally for the sum of Kshs. 30,279,298.00 together with interest at 12% per annum from the date of filing suit until payment in full. The defendants shall bear the costs of the suit.**

DATED and DELIVERED at NAIROBI this 19TH day of NOVEMBER 2019.

D. S. MAJANJA

JUDGE

Court Assistance: Mr M. Onyango

Mr Mito instructed by Daly and Inamdar Advocates for the plaintiff.

No appearance for the defendant represented by L. M. Kinuthia and Associates Advocates.